



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

KITALE HIGH COURT CIVIL CASE NUMBER 69 OF 2010

(FORMERLY NAIROBI HCCC 257 OF 2008)

YOUNG TIMBER MART LTD.....PLAINTIFF

VERSUS

ELIJAH MWANIKI.....DEFENDANT

RULING

1. The plaintiff instituted this suit against the defendant seeking for a declaration that the acts by the defendant in carrying unauthorized passengers and luggage and giving out the Motor Vehicle KAW 382 K to a third party or unauthorized driver were unlawful and beyond the scope of his duties. The plaintiff also sought for an order that he be declared not liable for all the claims arising from the Road Traffic Accident and the defendant be fully blamed.

On 23rd October, 2009 the plaintiff filed a notice of motion which is brought under the provisions of order XXXVII Rules 1 and Order L Rule 1 of the Civil Procedure Rules as well as Sections 3A and 63 of the Act.

2. The plaintiff is seeking for orders that; firstly, the suit being; **Nairobi HCCC No. 257 of 2008 (Young Timber Mart Ltd vs. Elijah Mwaniki)** be tried first on a priority basis so that the issue of liability alleged against the defendant therein in respect of the accident involving the plaintiff's motor vehicle (Registration No. KAW 382 K Mitsubishi Lorry) which occurred on or about the 17th April, 2008 along Lodwar-Kapenguria Road can be determined.

Secondly, all further steps in the other suits mentioned in the heading of this application and further suits that may hereafter be filed in any court arising out of the aforesaid accident be stayed pending the hearing and final determination of the said issue of liability against the plaintiff in the suit first above mentioned, namely Nairobi HCCC No. 257 of 2008 aforesaid on the basis that:-

(a) The plaintiffs in all the suits so stayed as well as in any other suit hereafter filed as aforesaid shall be bound by the said determination of the issue of liability in Nairobi HCCC No. 257 of 2008 as between the defendant and the plaintiff.

And;

(b) The defendant and the plaintiff whether enjoined together as defendants or brought in as a Third

party in each of the suits so stayed shall likewise be bound by the said determination in all the suits mentioned in the heading of the application as well as in any other suit hereafter filed as aforesaid.

Thirdly all further and other directions be given as may appear to this Honourable court to be just and necessary.

3. This application is supported by the grounds stated on the body thereto. Those grounds are elaborated upon in greater detail by the matters deposed to in the supporting affidavit sworn by **Francis Wanderi Kariuki** on 22nd October 2009.

According to the plaintiff, the accident was caused by **Elijah Mwaniki** the defendant herein who was instructed to transport goods from Nairobi to Lokichogio. The defendant was given instructions not to carry unauthorized passengers. On the way to Nairobi, contrary to the instructions, the defendant carried passengers and goods in the motor vehicle. The motor vehicle was involved in an accident. The defendant did not only carry unauthorized passengers but he also gave the vehicle to unauthorized driver. It was while the motor vehicle was in the hands of a third party that the accident occurred, causing injury and loss of lives to passengers.

4. **Mr. Kiarie** learned counsel for the applicant submitted that this suit should be tried first, all the other suits filed by the claimants who were injured in the accident be stayed until the issue of liability is determined in this suit. If this suit is determined, the issue of liability between the plaintiff and defendant will also be settled and thus the findings will be applicable to the other pending suits. Counsel further submitted that determining this suit first, will also save judicial time, the other alternative would be to seek to enjoin the defendant in all the other suits which will be time consuming and cause undue delay.

5. On the part of the interested party; **Mr. Barongo** their learned counsel opposed this application. He relied on the grounds of opposition on points of law. It was argued that the defendant was at the material time an employee of the plaintiff. Thus the plaintiff is vicariously liable for the accident that was caused due to the negligence on the part of its own employee. The defendant negligently gave the motor vehicle to a third party who caused the accident. In support of this preposition, counsel relied on the case of; **Securicor Kenya Ltd v Kyumba Holdings Ltd {2005} e KLR** in that case the Court of Appeal discussed what constitutes vicarious liability and quoted the Text Book **Winfield and Jolowicz ON TORT 14th Edition**.

In further arguments, counsel submitted that this application offends the provisions of Order 1 Rule 15 of the CPR which provides that a party seeking indemnity from a third party should file a third party notice .

6. In analyzing the issues raised in this application, although the application is directed against the defendant, essentially the orders that are sought affect the interested parties who have filed several claims against the plaintiff as the registered owner of the motor vehicle that caused the accident. The defendant was also at the material time an employee of the plaintiff. The plaintiff was at liberty to file this suit against the defendant or seek to join the defendant in the suits filed by the claimants as provided for by the provisions of Order 1 rules 15 which provides as follows;

‘where a defendant claims as against any other person not already a party to the suit (hereinafter called the 3rd party) –

(a) That he is entitled to contribution or indemnity ; or

(b) He is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

He shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

Going by the above provisions of the CPR, it is clear the plaintiff could also have sought to issue a third party notice to the defendant to seek for indemnity for the claims arising out of the accident that was caused by the defendant.

7. Thus the plaintiff failed to follow the above procedure and now wishes to stay all the suits filed by the claimants who are not parties to this suit. I am of the opinion that staying the suits against parties who are not parties in this suit will not serve the interest of justice. Further more the plaintiff should have sought to enjoin the defendant in those suits or it should have issued a third party notice to the defendant. Issuing an order that affects non parties in a suit will not serve the ends of justice.

Accordingly I find no merit in this application which I hereby dismiss with costs.

RULING READ AND SIGNED ON THE 24TH JUNE 2011.

MARTHA KOOME

JUDGE